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Paper No. 25

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In re Application of :
Jessop et al. :
Application No. 09/196,524 :
Filed: November 20, 1998 :
Attorney Docket Number :
3517.1 :
:

COPY MAILED
DEC 17 2003
OFFICE OF PETITIONS

This is a decision on the petition under 37 CFR 1.137(a), and alternatively under 37 CFR 1.137(b), filed November 21, 2003, to revive the above-identified application.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

The petition under 37 CFR 1.137(b) is **GRANTED**.

Any further petition to revive the above-identified application must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Request for Reconsideration of Petition under 37 CFR 1.137", and be addressed to Petitions Attorney Derek L. Woods. This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to timely and properly reply to the non-final Office communication, mailed July 2, 2002, which set a statutory period for reply of three (3) months. Extensions of time under the provisions of 37 CFR 1.136(a) were available. No reply having been received, the above-identified application became abandoned on October 3, 2003. A Notice of Abandonment was mailed on March 19, 2003.

Petition under 37 CFR 1.137(a) for unavoidable abandonment

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by: (1) the required reply (unless previously filed), which may be met by the filing of a

notice of appeal and the requisite fee; a continuing application; an amendment or request for reconsideration which *prima facie* places the application in condition for allowance, or a first or second submission under 37 CFR 1.129(a) if the application has been pending for at least two years as of June 8, 1995, taking into account any reference made in such application to any earlier filed application under 35 USC 120, 121 and 365(c); (2) the petition fee as set forth in 37 CFR 1.17(1); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c). The instant petition lacks items (1) and (3).

Applicant's Assertion

Applicant asserts that the delay in responding to the July 2, 2002, Office communication was unavoidable because apparently an a former associate of the law firm responsible for prosecution of this application intercepted the Office communication "before it was properly docketed or distributed." Petition at p.4.

Applicant has not provided an adequate showing of unavoidable delay

As to item (3), Applicant has not demonstrated unavoidable delay. A delay resulting from a docketing error on the part of an employee in the performance of a clerical function may provide the basis for a showing of "unavoidable" delay, provided it is shown that:

- (1) the error was the cause of the delay at issue;
- (2) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; and
- (3) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care.

See MPEP 711.03(c) (III) (C) (2). See, also, *In re Egbers*, 6 USPQ2d, 1869, 1972 (Comm'r Pat. 1988), rev'd on other grounds sub nom., *Theodor Groz & Sohne & Ernst Bechert Nadelfabrik KG v. Quigg*, 10 USPQ2d 1787 (D.D.C. 1998)

Petition under 37 CFR 1.137(b) for unintentional abandonment

A grantable petition under 37 CFR 1.137(b)¹ must be accompanied by: (1) the required reply,² unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(c).

With the instant petition, Petitioner has satisfied the requirements of a grantable petition under 37 CFR 1.137(b). An Amendment in response to the July 2, 2002 Office action is filed with the instant petition. Accordingly, the petition is granted.

This application is being forwarded to Technology Center Art Unit 1723 for processing of the Amendment, filed November 21, 2003, in due course.

Telephone inquiries concerning this matter should be directed to the undersigned at (703) 305-0014.


Derek L. Woods
Petitions Attorney
Office of Petitions

¹ As amended effective December 1, 1997. See Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. 53131, 53194-95 (October 10, 1997), 1203 Off. Gaz. Pat. Office 63, 119-20 (October 21, 1997).

² In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.